HARVARD

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THEORY OF POST-MORTEM DISPOSITION: RISE OF THE ENGLISH WILL.[1]

AS the first step to any stable theory of the post-mortem dispositon of property, whether by testacy or by intestacy, it must be observed that the idea of absolute property forever in any particular owner, as in the case of an estate to a man and his heirs forever, is a fiction, — a useful fiction probably, but still a fiction. A grant to a man and his heirs forever is a grant to each grantee forever; the "heirs" have nothing in the estate granted. The grant therefore is to the grantee as if he might live forever, which manifestly is impossible, so far as this present life is concerned; and it is certain that no man can take his property with him after death. There can be no such thing then as absolute property forever, in the true sense of the term.

It is no answer to say that a man may be considered to live in his posterity, or even, to put the case still stronger, that a man holds posterity in his loins; for either form of statement is as much a fiction as the one first mentioned. The childless man is conclusive of the point. Nor is it an answer to say that the owner of property may sell or exchange it for things consumable (if it be not consumable itself), and then consume the substitute; for in the case in hand the property, whether consumable or not, has not been consumed. Though it or some substitute might have been used up, as a matter of fact it has been left, and it is now to

[1] Advance sheets of a work on Wills, in the Students' Series, by Melville M. Bigelow.

be disposed of at death. The answer supposed confuses the notion of "absolute" property, or one's *power* over things, with the duration of such power. As a mere matter of power, a man may certainly own property "absolutely."

Considered, however, as a theory, as it must be, how is the theory of ownership forever to be worked out? With cases of testacy there would be no difficulty; the testator is dealing with his own, and acting in person. In cases of intestacy the theory can only be worked out upon the idea of an implied agency in the State; the State acting for the owner in case of his failure to dispose of the property. But it is plain that such an agency can only stand upon a footing wholly unique and unlike any other. In the first place the supposed agency would be confined, as a matter of fact at least, to giving; it would not extend to selling or otherwise contracting. In the second place the supposed agency would go into operation where recognized agency ends, with the death of the principal. And in the third place the agency would be irrevocable. Agency cannot be stretched to such a point. And the same will be found true of any other term that may be used to do duty for the idea of acting for one who is defunct.

On what support then can a stable theory of post-mortem disposition be placed? Discordant answers have been suggested.

One answer is, that the title to property, subject to life ownership in a grantee, is in the State, and, but for the fact that the State has thought best to allow such grantee to designate the course of the property after his death, it would always revert to the State upon the death of the grantee. This view of the case, it may be noticed, has nothing to do with original ownership in the State, except inferentially; it proceeds upon the notion that the State has some sort of reversionary right upon the death of its grantee in fee and of each of his successors in ownership, because in the nature of things no man can hold property forever. The theory of perpetual ownership collapses the moment it is put to the test, according to this view. I hold to myself and my heirs forever, the grant declares; but after my death the property becomes the State's, though the State allows me, by some sort of agency, to dispose of it. That fact, however, has no bearing upon the soundness of the theory of State ownership.

What then are the facts upon which this last named theory rests or derives support? And how does the theory work out its result? These questions in order.

Intestate laws strike one first. The State regulates the disposition of property at the death of the owner if the owner fails to dispose of it. And it may be noticed that the owner may so fail, not merely by making no attempt, but by making an attempt that does not conform to law. How, it might be urged, can the State interfere in such a way except upon the footing of ownership? The act of disposition is an act of dominion. If the State does not become owner at the time of the State's action, then the State cannot give the property, except by an exercise of arbitrary power, which means robbery. Again, if the State does not acquire ownership at the death of the grantee, who does? Not ordinarily the next of kin, in the case of personalty; in most cases[1] the State hands the property over to the executor or administrator. Not the heir, it might be said, even in the case of realty; the State hands the property over to him.[2] The State so hands the property over even against specific legatees or devisees, though there is no reason in the nature of things why the legatees or devisees might not take directly subject to the claims of creditors.

Another fact which may be deemed to support the idea of State ownership is connected with what is called title by occupancy. The taking of really vacant property would seem to give to the taker ownership by natural right. But we are told that "this right of occupancy, so far as it concerns real property . . . hath been confined by the laws of England within a very narrow compass."[3] It seems to have been allowed, in real property, even at the first in but a single case, namely, in an estate for the life of another ("pur autre vie"), the tenant dying during the lifetime of that other person ("cestui que vie"). In such an event any one might enter upon the land and hold it during the unexpired period of the estate, that is, until the death of "cestui que vie." But this right was reduced almost to nothing in the seventeenth century by statute. That is, according to the view of State ownership,

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[1] Where, in the absence of debts against the estate, the property is found, after the late owner's death, in the hands of one who would be entitled to it, one need not take out letters of administration in order to acquire title. That is probably the effect of English statutes.

[2] The State, however, hands the property over to the executor, administrator, or heir as representing the deceased; hence the State cannot be said to act as owner in the transaction except in so far as interfering may be considered an act of dominion, and so of ownership; with which point compare the law of trover. The suggestion as to the heir is of course pure assumption.

[3] Blackstone, II. 257.

the State acted upon the principle or belief that the ownership had never been vacant; the entry of the new occupant was by mere permission, which the State now withdrew.

A more particular case, looking it may be thought towards State ownership, may be brought forward. Statutes exist touching any right of adopted children to inherit property of their parents by blood. Whether such children can so inherit is determined by statute; the State, it may accordingly be supposed, gives or withholds. To the suggestion that adopted children have no "natural" right to the property of a deceased parent by blood, the answer has been given from the bench that the suggestion is idle "for the reason that the statutory right is perfect and complete"; heirship being "not a natural, but a statutory right." Hence the State may increase the number of a man's heirs and cut down the shares of the others accordingly.[1]

These are a few out of many like instances that might be mentioned; but all may be comprehended in the statement that both intestate and testate disposition of property is a matter of statute; in other words, of regulation by the State. The State, it may therefore be thought, must be the owner; and besides, the State lives or may live forever, or at any rate it is expected to outlive the life of individuals, and therefore fulfils by possibility the requisite duration. And the State's grantee and his successors have permission or appointment, so the argument would run, to act instead of or for the State in disposing of property to pass at their death. We have, then, according to this theory, State ownership, with agency in the holder as a supplementary theory by which disposition post-mortem is worked out. Can this doctrine be put aside?

The question may be answered indirectly in the course of propounding another, and what appears to be the true, theory of law; which may be put thus: In the case of intestacy the State acts as an intermediary, in behalf of the public welfare. If no provision for the disposition of the property were made, the property at the death of the owner would become vacant, and a scramble would be apt to follow, the result of which would be as likely to be undesirable as the contrary. To prevent the property becoming vacant, the intestate, accepting a virtual offer by the State to act upon certain established terms, to wit, the intestacy statutes, — for in

[1] Wagner *v.* Wagner, 50 Iowa, 532; Abbott's Cases, p. 123.

effect these are only an offer, — commits or leaves the property to the State, to distribute it upon those terms.[1] In this view the intestate has a well founded belief that the disposition which the State proposes is just and may save trouble, and possibly embarrassment and failure; and experience shows that in point of fact this is true in most cases, where attention has been called to the matter at all.

In the case of testacy it would seem at first that a theory actually prevails that the testator, in disposing of property owned by him absolutely, is disposing of his own, as much as when he gives or sells to take effect in his lifetime. But looking below the surface, this may after all be considered as merely concealing a distinction between ownership and title. The idea of testate disposition, when closely examined, appears to be no more than this, that, whatever may be true of ownership in the sense of holding and enjoying, a person's *title* may run on after the death of the person having it, wherever the grant or devise is to him and his heirs. Title accordingly means authority to dispose of; in that sense, obviously title may be severed from ownership, and indeed have no connection with it.

It may be objected that this is using the word title in a sense out of the ordinary, and making it do duty for an idea foreign to it. But that is not true, as appears from the legal phrase "right and title to convey"; at any rate, the word is easily capable of the meaning given to it; and when understood accordingly, it is consistent with the fact that ownership, in the sense of having and controlling in the name of ownership, comes to an end with the

[1] "Occupancy," says Blackstone, II. 257, "is the taking possession of those things which before belonged to nobody. This . . . is the true ground . . . of all property. . . . But when once it was agreed that everything capable of ownership should have an owner, natural reason suggested that he who could first declare his intention of appropriating anything to his own use, and . . . actually took it into possession, should thereby gain the absolute property of it; . . . quod nullius est, id ratione naturali occupanti conceditur."

Speaking of estates pur autre vie, Fry, J. says that when such an estate "is given to a man, or to him and his heirs, the most he can take is an estate for his own life, and any one who comes in after him takes, not through him, but as occupant of the estate. Originally, any one who pleased was allowed to scramble for the occupancy after the death of the first taker, but this was found to be so inconvenient that he was allowed to appoint by will a special occupant. But still every one who came in after the first taker came in as an occupant, and not as deriving title through him." In re Barber, 18 Ch. D. 624, 627.

This fairly represents the state of things which the laws in general concerning post mortem disposition of property are intended to prevent.

owner's death, even though he holds "to himself and his heirs forever."

That fact should be emphasized; one's ownership or *having* necessarily comes to an end with death. What would then happen but for a power of disposition resting somewhere, where it could and ordinarily would be exercised so as to preserve and help on the social instinct which seeks to draw men together in the State, — that has already been suggested. The property would become vacant, and, according to its value, a thing to be scrambled for. Society, the very purpose and product of the social instinct, would be pulled apart upon the death of the first man having property enough to excite a scramble. To prevent such a catastrophe the absolute owner has "title" or authority to make a will, as the one most likely to act in accord with the social instinct; and in event of his failure to act, the State exercises the authority.

Thus disposition by testacy and disposition by intestacy stand upon the same footing, and are expressions of the same deep purpose, to wit, the prevention of a vacancy and the failure of what is the very foundation of society and order, the social instinct. They do not express any theory of State or individual ownership of property forever. The individual in the case of testacy, the State in the case of intestacy, is an intermediary.

If still the question is raised, from what source emanates the authority which confers ownership upon devisee, legatee, or distributee, the answer is, the social instinct.[1] The power of disposition is conferred upon the owner or upon the State; it does not emanate from either. Nor does it emanate from the social instinct as fictitious owner of the property; the power is the expression of the social instinct as a social and political necessity. Ownership is not a necessary condition to conferring ownership.[2] To maintain the social order, power or authority, without being synonymous with robbery or injustice, may act and confer ownership. So it does act, it is conceived, in the matter of post-mortem disposal of property.

It does not make against this theory that in early times, among

[1] There lies the very source of law; law is only the drawing and keeping men together in society, — the fulfilling of the social instinct.

[2] That was a "marvellous thing" in the fifteenth century, when it was first seen that a mere direction to an executor to sell lands, which belonged by descent to the heir, could when acted upon by sale confer ownership. It was drawing "fire from a flint when there was no fire in the flint." Year Book, 9 Hen. VI. 24 b. But it is no marvel now.

our Germanic ancestors, property always fell to heirs after the tenant's death; that is, that a property owner could not make a will having any force or effect in regard to the descent of the property. For, to put the case in the usual way, the property belonged to the family, as a sort of corporation; while the family continued, the community had nothing in the property. It is a different way of putting it, but it is probably true, also, to say that the property fell from father to child rather than, through a vacancy, to the man who could first lay his hands upon it. It was better that the late tenant's kin should have it; and the only interest the community had in the matter was to see that the kin did have it. That interest on the part of the community was, however, the interest of self-preservation; not to regard it would be to invite anarchy to tear society to pieces.

It is obvious that the same was true in feudal England, when the right to make wills, admitted and practised of goods and chattels, was cut off in respect of land.[1] Except as original source of right, with right of escheat on failure of heirs, the State was not deemed owner, resuming its own upon the death of the tenant, and then making a gift of the property to the next taker. It acted then as before, and as at the present time, as an intermediary, to see that the social fabric should not perish. The transfer made was a transfer by rightful authority or power, not the gift of an owner.

Such appears to be the actual theory of the law. Still it is probably true, as has already been observed, that in the earlier period of the races which later became English, wills were not in use. The appearance of wills in the Germanic codes (the Leges Barbarorum) of a later time, was due to contact with Roman jurisprudence, and was borrowed from that source of civilization.[2] In the earlier period A's cattle, upon A's death, regularly passed to A's heirs, if he had any; A could not prevent it.[3] This fact directly raises another sort of question which the theory above presented naturally suggests, namely: Intestate disposition being the rule, how did disposition by will come about? *Whence* it came

[1] Wills of land were lawful and in constant use in England before the Norman conquest (1066).

[2] See Maine, Ancient Law, c. 6, p. 189; Abbott, p. 19.

[3] "When the phenomena of primitive societies emerge into light, it seems impossible to dispute a proposition which the jurists of the seventeenth century considered doubtful, that intestate inheritance is a more ancient institution than testamentary succession." Maine, Ancient Law, c. 6, p. 189; Abbott, p. 19.

has already been noticed; it was the gift of Rome's expiring civilization to Rome's rude conquerors, awakened at last, by closer contact with that civilization, to a better life.[1] But *how* did the making of wills come to be allowed? Equality, at least among male children, and indeed among daughters in the absence of sons, was the inveterate principle of the Germans in their original abodes north and east of the then conquering eagles of Rome.[2] Wills necessarily implied inequality.

The process by which wills came to be recognized appears to have been as follows.[3] The earliest lawful wills of our Germanic ancestors were based, it seems, (1) upon failure of kindred near enough, that is, within the family, to take by the regular method, intestacy; or they were (2) gifts of property to which such kindred had no direct claim. To find the evidence for the first of these cases would take us too far afield into early Germanic usage; for evidence of the second, it is not necessary to go back to the earlier home of the English people. It is still true, many centuries after the migration, in Norman England. Lands acquired by inheritance as family domain were considered more or less like entailed property, that is, property in which the "heir" had a legal interest in the lifetime of the tenant, so that the heir's consent was necessary to any transfer even *inter vivos*.[4]

The words of inheritance in our modern deeds, "to A and his heirs,"[5] were, in their Latin form, "et suis hæredibus," first brought into use in England in the twelfth or late in the eleventh century, following upon the establishment, effected towards the close of the eleventh century, of the (English) feudal tenures, in the case of feoffments or gifts of fiefs or feuds by lord to tenant. At

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[1] As to the wills in the Germanic codes, "they are almost certainly Roman. The most penetrating German criticism has recently been directed to these Leges Barbarorum, the great object of investigation being to detach those portions of each system which formed the customs of the tribe in its original home from the adventitious ingredients which were borrowed from the laws of the Romans. In the course of this process one result has invariably disclosed itself, that the ancient nucleus of the code contains no trace of a will. Whatever testamentary law exists has been taken from Roman jurisprudence." Maine, *ut supra*.

[2] Preserved in Kent in gavelkind, well called the common law of Kent.

[3] See Sir H. S. Maine, in the sixth chapter of his Ancient Law; also, Abbott's Cases, pp. 19 *et seq.*, where Maine is quoted at length.

[4] It is possible, though but barely possible, that there still survived a notion of the family as a corporation.

[5] The author is now using a note of his own to the fifth American edition by him of Jarman on Wills, II. 332.

the same time, it may be noticed, in immediate connection with these words of inheritance, reciprocal words declaring that the fief or feud was to be held of the feoffor "and his heirs" were introduced into the (oral or written) conveyence. The feoffment contemplated a relation forever between the donor and descendants and the donee and descendants.

In the times referred to, the "heir," as we have said, deemed himself in some sort included in the original gift of the lord, either as quasi tenant in tail, or as having some other interest of which he ought not to be deprived without his consent. In other words, the heir considered that he took, in modern phrase, by purchase. But the case was different in regard to lands which the ancestor had himself added to his estates by acquisition of his own.[1] With property so acquired the right of will-making, in regard to land, practically begins.

Testamentary disposition of personalty was everywhere much earlier, though not in western Europe, without important limitations. In the latter part of the thirteenth century Glanvill tells us that a man's goods were to be divided into three equal parts, one for his heir, another for his widow, the third to be at his own disposal.[2] If he died without a wife, he might dispose of one half,

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[1] In the Custumal, known as the Laws of Henry the First, a book of the first half of the twelfth century, it is said that one who has bookland (land of inheritance conveyed by writing) from his "parentes" should not convey it away from his family. Henry I. c. 70, § 21; Placita Anglo-Normannica, Introd., 44, 45, note. In the reign of the same king (1100–1135) a son confirms, or rather makes anew, a gift of land made by his father to the Church, which had been adjudged good against the son. Placita Anglo-Norm., 128, 129. See also Hist. Mon. Abingdon, II. 136, anno 1104. About the year 1160 the Abbot of Abingdon sues a tenant named Pain "cum filio quem hæredem habuit" to recover fiefs forfeited, as alleged, by the father. Pain "et filius suus" entered into a concord with the abbot, and so terminated the suit. These were cases of gifts to the donee and his heirs.

Writing some twenty-five years later, Glanvill says that a man may make a will in his last sickness, "with the consent of his heir"; that he cannot "without his heir's consent" give any part of his inheritance to a younger son; and that he cannot disinherit "his son and heir" even as to land which he (the father) has bought, though if he have no heir of his body he may do as he will with such land. But he may convey a reasonable part of purchased property without consent of his bodily heir. Lib. 7, c. 1.

This special relation of the heir to his father's fief did not long survive the twelfth century, though traces of it appear in Bracton, who wrote in the reign of Henry the Third. See Lib. 2, c. 6, fol 17 b. The word "assigns," — to the feoffee, his heirs and assigns, — which greatly helped alienation, was introduced into the feudal gift early in the thirteenth or late in the twelfth century.

[2] Glanvill, Lib. 7, c. 5. See Magna Charta of John (A D. 1216), c. 26, of Henry III., 1216, c. 21, 1217, c. 22, 1224, c. 18; Bracton, 60 b; Fleta, Lib. 2, c. 57, § 10. So

the other half going to his children if any; if he had no children, his wife, if he had a wife, was to have half; and if he died without wife or children, he might dispose of the whole. Subject to differences of local custom, this continued to be true until the time of Charles the Second.[1] By this time personalty might be disposed of by will freely in the greater part of England,[2] the claims of the widow having continued, however, after those of the children had disappeared.[3]

The rise of primogeniture under feudalism in the Middle Ages appears to have created the occasion and demand for testamentary disposition. Originally, that is, before the fall of the Roman Empire, children among the German races, as we have seen, took equally; primogeniture, which of course destroyed all equality, was a thing of slow and gradual growth, beginning here and there with the feudal tie among the conquerors of Rome, and finally spreading over Europe; though not without admitting in various places some different custom, such as borough English, the converse of primogeniture, but equally fatal to the idea of equality among the children. And now, "as the feudal law of land practically disinherited all the children in favor of one, the equal distribution even of those sorts of property which [still] might have been equally divided ceased to be viewed as a duty."[4] And the way to carry out the owner's wishes, as a practical matter of method, was pointed out by Roman jurisprudence and usage. The clergy produced the Roman will, and used it as a model for the purpose in hand. The will has accordingly been called "an accidental fruit of feudalism."[5]

It should be added that primogeniture did not come into full operation in England until after the Norman conquest. On the

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some fifteen years before Glanvill, in the Constitutions of Cashel, c. 6 (A. D. 1172), introducing English law into Ireland; but saying "children" where Glanvill says "heir." Giraldus Cambrensis, Conquest of Ireland, Lib. 1, c. xxxiv. Magna Charta, Bracton and Fleta, *ut supra*, and Regiam Maj., Lib. 2, c. 37, also say "children" instead of "heir." This casts a doubt upon the text of Glanvill; is it likely that primogeniture made such a great advance as that indicated by Glanvill, within a few years, and then, within another short time, fell back to its old position?

[1] See Blackstone, II. 491.

[2] The older usage of the common law, in favor of the widow and children, prevailed longer in Wales, in the province of York, and in London. Ibid.

[3] Maine, Ancient Law, c. 7, p. 217; Abbott, p. 26.

[4] Maine, c. 7, p. 217.

[5] Ibid. On the various stages of the English will, see Pollock and Maitland's History of the English Law, II. 312–353. That subject is beyond the present purpose.

Continent, however, it had gained full sway much earlier; hence we must turn to the Continent, as we have done, to find the statement true that testamentary disposition was due to primogeniture.[1]

Having now pointed out the origin of wills, a distinction should be noticed in the theory, or more properly in the very doctrine, of wills, between testamentary or intestate disposition of personalty and testamentary disposition of realty. The distinction is between taking under representation and taking under conveyance. An executor represents the testator; a legal or fictitious as distinguished from natural or true personality being assumed to exist in the executor and to continue until the duties committed to him have been performed. The legatee takes accordingly from a representative, or by "succession," to use a term of the Roman law. And the same is true of distributees in intestacy; they take from the administrator as representative.

In the case of realty, however, the devisee takes, by common law doctrine, as by a conveyance from the testator, though the "conveyance" takes effect, of course, only from the death of the testator, on the probate of the will. This operation of wills of realty will come out more clearly in the next chapter, where the testator will be seen in early times conveying his lands to another to uses such as he (the testator) may then or afterwards designate by will. But the full significance of this distinction will only appear in a later chapter; for the present it is enough to say that, at common law, devises are, in certain respects, governed by rules akin to those relating to conveyances *inter vivos*.[2]

Melville M. Bigelow.

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[1] Wills still appear to have a close connection in England with the position of the eldest son. It is stated that wills are frequently used there to aid or imitate that preference for the eldest son and his line which is a general feature in marriage settlements of land. Maine, *ut supra*. For the process and stages by which primogeniture came about, the reader is referred to the passages in the chapter in Maine's Ancient Law, above cited, and to the extracts from the same in Abbott's Cases, pp. 26-28.

[2] All this is consistent with the theory of wills above presented as the "true" one; for breaking through mere form and looking at the substance of things, as one may here do, it is still true that in the case of testacy the testator, in the case of intestacy the State, is but an intermediary acting for the common weal. The text at this point only shows how the mediation operates. There is nothing in the way the mediation works to affect the theory.